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SOME LEGAL PROBLEMS INVOLVED IN THE TRANSMISSION OF FUNDS

If A pays money to B for transmission to C, what is the nature of the legal duty imposed on B? A statement which has frequently been made in substance in judicial opinions is that:[1] "Deposits made with bankers are either general or special. In the case of a special deposit the bank merely assumes the charge or custody of property without authority to use it, and the depositor is entitled to receive back the identical money or thing deposited. In such case the right of property remains in the depositor and if the deposit is of money the bank may not mingle it with its own funds. The relation created is that of bailor and bailee and not that of creditor and debtor."[2]

There are in fact at least four devices known to Anglo-American law by which the duty to pay C may be imposed on B, as follows:

1. A may deposit the money with B as bailee. If the intention is that title or ownership of the money shall pass to C, B will at once become bailee for C, and C on demand and refusal may maintain the usual possessory actions[3] against B, based on his, C's, ownership. Or B may become bailee for A with the power and possibly, also, the contractual duty on B's part to discharge the bailment by delivery of the money to C.

2. B may receive the money from A as a fiduciary either with power to discharge the fiduciary obligation by payment to C or with the duty enforceable by C to pay C. This fiduciary obligation is identical with that of the bailiff or receiver whose obligation in the early days of the common law was enforced by the common law action of account,[4] later

[1] *Marine Bk.* v. *Fulton Bk.* (U. S. 1864) 2 Wall. 252, 256; *Fogg* v. *Tyler* (1912) 109 Me. 109, 83 Atl. 664; *Butcher* v. *Butler* (1908) 134 Mo. App. 61, 114 S. W. 564; *Titlow* v. *Sundquist* (C. C. A. 1916) 234 Fed. 613; *Montagu* v. *Pacific Bk.* (C. C. 1897) 81 Fed. 602; *Alston* v. *State* (1890) 92 Ala. 124, 9 So. 732; *McLain* v. *Wallace* (1885) 103 Ind. 562, 5 N. E. 911.

[2] See 2 Morse, *Banks and Banking* (5th ed. 1917) § 567.

[3] *Anonymous* (1339) Y. B. 12 & 13 Edw. III 244; *Brand* v. *Lisley* (1609) Yelv. 164; *Sturtevant* v. *Orser* (1862) 24 N. Y. 538; and see 1 Ames, *Cases on Trusts* (2nd ed. 1893) 52n; "Detinue," Ames, *Lectures on Legal History* (1913) 71.

[4] *Ryvere* v. *Frère* (1310) Y. B. 3 Edw. II 42, reprinted in 20 Selden 126; *Robsert* v. *Andrews* (1588) Cro. Eliz. 82; *Harrington* v. *Deane* (1612) Hobart, 36;

by debt,[5] and still later by *indebitatus assumpsit.*[6] The obligation of the fiduciary differed from that of the strict common law debtor in that the fiduciary was bound to keep on hand the specific money or an identifiable *res* lawfully substituted for it, and loss of the money without his negligence or fault discharged B from further liability.[7] And in any proceeding for the distribution of B's assets among his creditors the person entitled to the performance of the fiduciary obligation was entitled to payment of the money or to the specific *res* in priority to general creditors.[8]

3. A might deposit the money with B upon an express trust for C or in trust for A but with the power and possibly, also, the duty to discharge the trust by payment to C.[9] The obligation of B is substantially like that of the common law fiduciary except that, if an express trust, it was enforceable only in equity by a bill for an accounting and not by a common law action, the successor to the action of account.[10]

4. A might pay the money to B receiving in exchange B's undertaking in simple contract to pay a like amount to C.[11]

Bayton v. *Cheek* (1652) Style 353; *Hewer* v. *Bartholomew* (1597) Cro. Eliz. 614; see "Account," Ames, *Lectures,* 116. The proper action was account, not debt. *Anonymous* (1405) Y. B. 6 Hen. VI f. 7, pl. 33; see Ames, *Cases on Trusts* 1n; and cases on the action of account, Cook and Hinton, *Cases on Pleading at Common Law* (1920) 135.

[5] *Clark's Case* (1612) Godbolt 210; *Harris* v. *de Bervoir* (1624) Cro. Jac. 687; see Ames, *Cases on Trusts* 4n.

[6] *Dale* v. *Sollett* (1767) 4 Burr. 2133; Ames *Cases on Trusts* 7n, 8n; Ames, *Lectures,* 116, 117.

[7] *Woodclife's Case* (1597) Moore 462; see (1488) 3 Hen. VII f. 4; (1462) 2 Edw. IV f. 15; (1491) 6 Hen. VII f. 12; (1495) 10 Hen. VII f. 26; Ames, *Lectures,* 119; *Cannon River etc.* v. *First Nat. Bk.* (1887) 37 Minn. 394; *Young* v. *Bundy* (Tex| Civ. App. 1913) 158 S. W. 566, (*semble*); and see 32 L. R. A. 769; *Foster* v. *Essex Bk.* (1821) 17 Mass. 479; *Giblin* v. *M'Mullen* (1869) 38 L. J. P. C. 25; *Ray's etc.* v. *Bank etc.* (Ky. 1874) 10 Bush 344; *Scott* v. *Bank* (1874) 72 Pa. St. 471; *Scott, etc. Co.* v. *Crews* (1871) 2 S. C. 522; *Boyden* v. *Bank* (1871) 65 N. C. 13.

[8] *Burdett* v. *Willett* (1708) 2 Vernon 638; see, *ex parte Dumas* (1754) 2 Vesey 582; *Vere* v. *Smith* (1671) 2 Lev. 5; *Anonymous* (1669) 1 Vent. 21; *in re Hallett's Estate* (1880) 13 L. R. Ch. Div. 696, 709; *Peak* v. *Ellicott* (1883) 30 Kan. 156, 1 Pac. 499; *Myers* v. *The Board of Education* (1893) 51 Kan. 87, 32 Pac. 894; *Ryan* v. *Phillips* (1896) 3 Kan. App. 704, 44 Pac. 909; *Shopert* v. *Indiana Nat. Bk.* (1908) 41 Ind. App. 474, 83 N. E. 515; *American Ex. Bk.* v. *Mining Co.* (1897) 165 Ill. 103, 46 N. E. 202; *Montagu* v. *Pacific Bk.* (C. C. 1897) 81 Fed. 602; *Massey* v. *Fisher* (C. C. 1894) 62 Fed. 958; *Anderson* v. *Pacific Bk.* (1896) 112 Cal. 598, 44 Pac. 1063; *McBride* v. *American Ry. etc. Co.* (1910) 60 Tex. Civ. App. 226, 127 S. W. 229; *City of Miami* v. *Shutts* (1910) 59 Fla. 462, 51 So. 929; *Cutler* v. *American Exch. Nat. Bk.* (1889) 113 N. Y. 593, 21 N. E. 710; *People* v. *City Bank of Rochester* (1884) 96 N. Y. 32; *Stein* v. *Kemp* (1916) 132 Minn. 44, 155 N. E. 1069; *Carlson* v. *Kies* (1913) 75 Wash. 171, 134 Pac. 808; *Covey* v. *Cannon* (1912) 104 Ark. 550, 149 S. W. 514; *Calhoun* v. *Sharkey* (1915) 120 Ark. 616, 180 S. W. 216.

[9] *Rogers Locomotive, etc. W'ks* v. *Kelley* (1882) 88 N .Y. 234; *Star Cutter Co.* v. *Smith* (1890) 37 Ill. App. 212; *Drovers' Nat. Bk.* v. *O'Hare* (1887) 119 Ill. 646, 10 N. E. 360; money paid to bank "to the use of" a third person, *Mester* v. *Q. Nat. Bk.* (1911) 163 Ill. App. 645; *McLeod* v. *Evans* (1886) 66 Wis. 401, 28 N. W. 173, 214; bank not permitted to mingle funds.

[10] *Bartlett* v. *Dimond* (1845) 14 M. & W. 49; see cases cited in Scott, *Cases on Trusts* (1919) 576. If the sole remaining duty of the trustee is to pay over a sum of money, some jurisdictions have allowed money had and received. See Scott, *op. cit.* 573n; Langdell, *Equity Jurisdiction* (2nd ed. 1908) 86.

[11] See *infra,* footnotes 32, 33, 35, 36, 49.

Any of these devices may be adopted at the option of the parties to the transaction and the particular device deemed to be adopted will depend on the intention of the parties as expressed by their language or acts and it may be inferred from the custom or the common course of business where there is no express stipulation. The adoption of any particular device will result in certain legal consequences in each case differing in some particular from those which flow from the others. Thus if the moneys are bailed the remedy would be by a common law possessory action, whereas if the moneys were deposited with a depositary as a fiduciary the remedy in early law was by the action of account. In modern law the remedy is by the form of action corresponding to debt or *indebitatus assumpsit,* [12] which were the true successors of the action of account, and, in the event of insolvency or bankruptcy of the depositary, resort may be necessary to a court having equity powers in order to give the depositor the preference over the general creditors to which he is equitably entitled. If the depositary is an express trustee the remedy is in equity and the rules of law applicable are those relating to trust funds rather than either debt or bailment. If the obligation is a simple contract obligation the liability of the depositary can be enforced only by an action in the nature of a special assumpsit action and the person entitled to enforce this duty in the event of insolvency of the depositary will rank only as a general creditor. [13]

Litigation arises with respect to this class of transactions because one of the parties to the transaction desires to secure the benefit or to avoid the consequences of the particular legal device which he urges the court either is or is not applicable according to his special interest in it. Uncertainty in the application of the law arises, therefore, for the most part, not from doubt or uncertainty about the exact definition of the rule of law applicable in the case of any given device. The difficulty which arises is one of interpretation of the facts. Viewed objectively did the depositor in a given case intend and did the depositary intend that the latter should assume the liability of a bailee, or a fiduciary, or a trustee, or a debtor? That is to say, was it the intention that the depositary should do the particular things that the law says it is the duty of a bailee or a fiduciary or a trustee or a debtor to do, as the case may be? In the absence of express stipulation this question can be answered by inference only from the conduct of the parties interpreted in the light of custom or the established course of business in which the transaction occurs.

In early law this problem was relatively a simple one. There was no developed law of trusts of personal property. The view was that one who received money for transmission to another was either a receiver, that is to say a fiduciary, or a bailee, and not an obligor in simple

[12] See *supra,* footnotes 5, 6.
[13] See *infra,* footnotes 32, 33, 35, 36, 49, 52, 53.

contract. Special assumpsit became established in our law only in the early 16th century [14] whereas detinue for money bailed was a common form of action early in the 14th century, [15] and account for money paid to a receiver was frequently the form of action resorted to in cases reported in the earlier Year Books. [16] Whether money so received constituted the depositary a bailee or a fiduciary depended upon whether he undertook to keep the money separate and apart from other money and to pay over the identical money to that other, or whether his duty was to have on hand at all times a specifically identifiable sum of money with the duty to account for it upon an action of account or, later on, in an equitable action for accounting. If the money was in a package or sealed up it was clearly a bailment, [17] but the money paid to the agent for disbursement or received by him for account of his principal did not constitute him a bailee but a fiduciary. If by "title" is meant a right in a *res* in the lawful possession of another which entitles one to maintain against that other a possessory action such as detinue, trover or replevin—which is ordinarily all that is meant by that term—it is clear that title to the bailed money was not in the depositary but in the depositor, whereas in the case of money deposited with the depositary as a fiduciary, title was in him [18] although the depositor was entitled in equity to recover in priority to general creditors of the depositary in the same manner as was a bailor. [19]

Since in the ordinary course of business, when money is paid over to B for transmission to C, B is not expected to turn the identical money over to C, and since the legal relationship in such transactions had been worked out by the law courts long before the establishment of equitable trusts of money, such transactions presumptively give rise to the fiduciary relationship rather than to either a bailment or a trust. Hence it is in Anglo-American law that we find a traditional judicial bias rooted in the history of the subject in favor of holding the receiver of money for transmission to the duties and liabilities of a fiduciary.

It is because the legal relationship of fiduciary and principal was worked out by courts of law, through the common law action of account and its successors, debt and *indebtitatus assumpsit,* without the aid of equity that we find in modern law a limited class of rights which in point of substantive law are identical with those created in favor of the beneficiaries of a trust by equity, but which unlike trusts may be enforced by

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[14] See especially "Assumpsit," Ames, *Lectures,* 129, 142, 143.

[15] *Supra,* footnote 3.

[16] *Supra,* footnote 4, see "Account," Ames, *Lectures,* 116.

[17] See cases cited *supra,* footnote 3 and Ames, *Cases on Trusts* 52n; *Fogg* v. *Tyler* (1912) 109 Me. 109, 83 Atl. 664; *cf. Coleman* v. *Dickerson* (1905) 71 Kan. 769, 81 Pac. 497.

[18] *Anon.* (1573) 3 Leon. 38; see *Core's Case* (1537) 1 Dy. 20a; see (1485) 2 Y. B. Rich. III 139. Professor Ames found evidence in the early cases that title in this sense was in the factor. "Account," Ames, *Lectures,* 117.

[19] See case cited *infra,* footnote 37.

an action at law. The puzzled student will find that the only method of determining whether an action to enforce such a right may be brought at law is to ascertain whether the right is one which might have been enforced by a common law action of account.[20] If account would have been the proper form of action at common law he may now have his action at law corresponding to the action of debt, or *indebitatus assumpsit,* although precisely as in the case of a trust the defendant may defend on the ground that the money was lost without his fault and the plaintiff may resort to a court having equity powers to secure priority over general creditors.

Although he who receives money to transmit to another for account of another is presumptively a fiduciary, this presumption may be overcome by proof evidencing an intention that the obligation is to be one in simple debt or contract without reference to any specific or identifiable fund of money. Thus one who is permitted to use money entrusted to his care as his own,[21] is liable as a debtor or contractor and not a fiduciary. Since the permitted use is consistent with the contractual obligation and inconsistent with the duty of the fiduciary, this intention may be evidenced by an agreement to pay interest[22] which is compensation for the use of money loaned or it may be inferred from a course of business indicating that the depositary is to use the money as his own.[23]

When money is to be transmitted by an individual or corporation engaged in the business of banking and there are no specific instructions by the depositor as to the method of transmitting the funds, the customary method of effecting such transfer should be of primary importance in determining just what was intended to be done and consequently what legal duties are imposed on the banker and what legal rights are acquired by the depositor and by the person to whom the money is to be transmitted.

The notion that a person or corporation receiving money for account of another or as his agent to pay to another is a fiduciary, for reasons already referred to, was firmly engrafted on our law long before the development of banking business as it is carried on in modern practice. The business of banking was first carried on in England to a limited extent in the reign of James I by the goldsmiths who received

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[20] See *supra,* footnotes 4, 5, 6; also Langdell, *Equity Jurisdiction* (1889) 2 Harvard Law Rev. 242, 258 *et seq.,* where he traces the history of the use of the concurrent jurisdiction of equity over the legal obligation to account.

[21] *Ex parte Broad* (1884) L. R. 13 Q. B. D. 740; *Parmenter* v. *American Box etc. Co.* (1899) 44 App. Div. 47, 60 N. Y. Supp. 432; see Scott, *op. cit.,* 44n, 53n; *Wetherell* v. *O'Brien* (1892) 140 Ill. 146, 29 N E. 904.

[22] *Giles* v. *Perkins* (1807) 9 East 12; *Pittsburgh Bk.* v. *McMurray* (1881) 98 Pa. St. 538; *Tucker* v. *Linn* (N. J. Eq. 1904) 57 Atl. 1017; *Wetherell* v. *O'Brien* (1892) 140 Ill. 146, 29 N. E. 904.

[23] *Whelan* v. *Enterprise Transp. Co.* (C. C. 1909) 175 Fed. 212; see cases *infra,* footnotes 34, 35, 36, and 49.

money on deposit.[24] Originally the banker seems to have been little more than a bailee or warehouseman of the precious metal entrusted to his care. The Bank of Amsterdam, one of the earliest and most famous of the continental banks, seems originally to have engaged merely in the business of warehousing money and precious metals received on deposit. Although of much earlier origin on the Continent the business of modern banking in the course of which the banker receives the general deposits of his customers and uses them as current funds in his business was first described in England in a pamphlet published in London in 1676 entitled *"The Mystery of the New Fashioned Goldsmiths or Bankers, Discovered."* And it came to be recognized as an established form of business in London only during the latter part of the 17th or early 18th century.

As was pointed out by Ricardo in his *"Proposal for an Economical and Secure Currency,"* a bank would never be established in this modern sense if it could earn profits only by employment of its own capital. To produce an adequate return on invested capital the banker must add to his financial resources by deposits and other funds entrusted to his care by customers. To secure the desired profit the banker must be free to use the funds entrusted to him as his own in making loans, retaining the profits or interest received from such transactions as his own and this is legally permissible only if the banker's legal relation to the depositor is that of debtor for deposits, either without obligation to pay interest or with an obligation to pay interest at a lower rate than the current bank rate.

No bank could maintain itself economically if it were either a bailee or a fiduciary or trustee of funds entrusted to its care as, in the first case, it could not use them in its business and, in the others, it could not use them for its own benefit and in its current banking transactions. The bank secures the funds thus loaned to it by depositors and customers principally because of the service which it provides in facilitating the transmission of money from those who owe it to those to whom it is due. This is customarily accomplished by the banker's opening a credit account in favor of the customer on which he may draw by bill or check, payable to the creditor, and in the case of payments of debts at distant points either by the banker's drawing on his own credit at such distant points in favor of the creditor and for account of his customer or depositor, or by the bank's securing for account of its customer "exchange" on such distant points payable to the creditor.

Although banks do on occasion act as bailees in the physical transmission of money as in the case of the exportations and importations of gold made to equalize exchange, this is the exceptional and not the customary method of effecting transmission. No customer depositing

[24] Dunbar, *Theory and History of Banking*: Gilbert, *History, Principles, and Practice of Banking*: Moulton, *Money and Banking*, Part II 10.

money with a bank in order to effect payment at a distant point would be justified in expecting that the banker would physically transmit the money to the point of payment.

In the absence of express stipulation for the physical transmission of the money the normal banking custom would be for the banker to credit the customer with the amount deposited and then draw on his own credit established with his banking correspondent at the distant point in favor of the creditor. The draft may be made by actual drawing of a check or draft on his correspondent or by instruction by mail or cable to his correspondent to pay the creditor and charge the payment to the banker's account which in turn is charged to his customer's account. If the banker has not established a credit at the distant point he proceeds to acquire one by the purchase of a bill of exchange drawn on a drawee at that point and made payable to the creditor. In either case, when the credit is drawn upon and made payable to the creditor, the banker charges his customer's account with the amount to be transmitted and the transaction is closed unless the credit is dishonored by the payer.[25]

When the transaction involves the banker's undertaking to procure the payment at a distant point the customer is often spoken of by bankers and in judicial opinion as having "purchased" exchange,[26] but it is obvious that the term "purchase" when applied to such a transaction where the banker does not deliver a bill or draft to the customer is a mere figure of speech and all that the customer has actually purchased is the banker's undertaking or obligation to effect the payment at a distant point. The exchange transaction also often involves not only the payment of money at a distant point but payment of a different kind of money than that in use at the point where the money is received by the bank from the depositor. It is a convenient and hence customary method of describing such a transaction to speak of it as the purchase of the particular kind of money which is to be paid at the distant point. Thus the merchant or traveller who wishes to establish a credit in a foreign country and secures it by payment of money in dollars to his banker, speaks of having purchased pounds sterling, francs, or lire, as the case may be, although all that in fact or in law he has actually secured is

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[25] For a more detailed account of the exchange transaction, see Eschen, *Elements of Foreign Exchange;* Withers, *Money Changing;* Whittaker, *Foreign Exchange;* (1919) 19 COLUMBIA LAW REV. 322; see also the stipulation as to the course of business in exchange transactions in *Legniti* v. *Mechanics & Metals Nat. Bk.* (1921) 230 N. Y. 415.

[26] See *Legniti* v. *Mechanics & Metals Nat. Bk.* (1921) 230 N. Y. 415; *Atlantic Communication Co.* v. *Zimmerman* (1918) 182 App. Div. 862, 170 N. Y. Supp. 275, 227 N. Y. 631, 126 N. E. 899; *Strohmeyer & Arpe Co.* v. *Guaranty Trust Co.* (1916) 172 App. Div. 16, 157 N. Y Supp. 955; *Bank of China* v. *American Trading Co.* [1894] A. C. 266; in *Legniti* v. *Mechanics & Metals Nat. Bk.* (1919) 186 App. Div. 105, 111, 112, 173 N. Y. Supp. 814, 819, (reversed on appeal; see *supra*), Shearn, J., said in his dissenting opinion, " . . . foreign exchange or credit is a subject of purchase and sale, and not only may be, but is commonly, contracted for in the same manner and governed by the same laws as in the case of purchase of wheat, cotton, or any other subject of commerce."

some kind of an obligation by the banker to secure credit at the distant point payable in pounds, francs, or lire, as the case may be. Even when the obligation is performed and the credit is established, he is still only the owner of an obligation or *chose in action,* and not of any actual foreign money.

Nor would the customer be justified in supposing that moneys deposited with the bank in order to ensure payment at a distant point would be dealt with by the banker in any different manner than in the case of other moneys deposited with the banker by his general customers. Moneys thus deposited are commingled with the general funds of the banker and dealt with by him as his own funds to be paid out in the course of his banking business which is publicly known and understood to be a business conducted for profit, and in general the customers in dealing with the banker and in the absence of express stipulation deal with him in reliance on his personal credit and not on the presence in the banker's hands of any specific fund to which he may assert a claim. Moreover the difficulties of transacting exchange business by maintaining a segregated fund for each customer until the transaction is completed would be practically insuperable.

Assuming that the transaction is not the exceptional one of bailment, does the banker who undertakes the transmission of funds in the ordinary course of the banking business become a fiduciary or is he a mere debtor or contractor who undertakes to discharge his debt by payment to a third person? If one bears in mind the elementary principles of banking hereinbefore referred to, which are of universal application, and the established custom of bankers in dealing with funds received in the ordinary course of business, the inference would seem to be irresistible that the undertaking of the banker was not fiduciary but is in the nature of a contractual obligation. The banker being engaged in a business whose very existence depends on the customary and rightful use of funds entrusted to him, as the banker's own, and the universal custom in practice being the use of such funds as the banker's own and their transmission by a system of credits, only the ordinary presumption that funds received for account of another are held in fiduciary capacity should not apply.

This is perfectly understood and applied with substantial unanimity by courts in determining the liability of the parties with respect to collections made by them for account of customers. So long as the banker is the holder of paper deposited with him by the customer for collection, unless the banker is a purchaser of the paper, he is deemed to hold it as the fiduciary of the customer. So that in the event of the failure of the bank the customer may claim the paper or its proceeds, if collected after his known insolvency, in priority to other creditors.[27] Or if the banker

[27] *Giles* v. *Perkins* (1807) 9 East 12, is the leading case; see a very complete collection of authorities in Scott, *op. cit.* 64n, 65n; see *Scott* v. *Ocean Bk.* (1861)

has negotiated the paper with a correspondent, his claim against the correspondent is deemed to be a *res* held by him as a fiduciary or quasi trustee for the benefit of the depositor who may avail of that benefit in priority to general creditors. [28] This rule is not limited or impaired but is supplemented by the rule which obtains in England and some of the United States that the bank for collection is a guarantor of the solvency of sub-agents employed by it for the purpose of effecting collection. [29]

But the moment the collection is effected the banker ceases to be a fiduciary and his obligation to his customer is then that of a mere debtor [30] plus such other special obligations as he may have assumed in connection with the customer's account, such as the duty to honor his checks or to pay designated accounts, and the like. The legal rules adopted by courts in this class of transactions are thus perfectly adapted to the custom and practices of the business and conform to the intention of the parties as evidenced by the fact that they have adopted a course of business well defined by custom, without any express stipulation that the usual course of business should not be followed. By employing appropriate stipulations the customary course of business and the consequent legal liability may of course be varied. [31]

But subject to such express stipulation the custom of banking and the essential purpose of the banking business are made legally effective by the adoption of the simple legal rule that when the banker acquires commercial paper or *choses in action* or any form of property other than current money for account of the depositor, the relation of the banker to the customer is that of a fiduciary. But whenever such property is converted into current money his relation to the customer is purely contractual with no other obligation than the discharge, when due, of the debt or contract thus created.

When the customer pays money to the banker for transmission it would seem that the same principles of interpretation should control. Every consideration which would lead to the conclusion that the collecting banker is a debtor when the collection is complete and there is no stipulation to the contrary would lead to the like conclusion when money is deposited, in the ordinary course of business, for transmission. As

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23 N. Y. 289; *National B. & D. Bk.* v. *Hubbell* (1889) 117 N. Y. 384, 22 N. E. 1031; *Gerding* v. *Welch* (1898) 30 App. Div. 623, 51 N. Y. Supp. 1064.

[28] *Evansville Bk.* v. *German-American Bk.* (1895) 155 U. S. 556, 15 Sup. Ct. 221; see, Scott, *op. cit.* 77.

[29] *Mackersy* v. *Ramsays, etc. & Co.* (1843) 9 Cl. & F. 818; *Briggs* v. *Central Nat. Bk.* (1882) 89 N .Y. 182; *Naser v. First Nat. Bk.* (1889) 116 N. Y. 492, 22 N. E. 1077; *St. Nicholas Bank* v. *S. N. Bank* (1891) 128 N. Y. 26, 27 N. E. 849; *Hutchinson* v. *Manhattan Co.* (1896) 150 N. Y. 250, 44 N. E. 775; *Baldwin's Bk.* v. *Smith* (1915) 215 N. Y. 76, 109 N. E. 138; *Exchange Nat. Bk. etc.* v. *Third Nat. Bk. etc.* (1884) 112 U. S. 276, 5 Sup. Ct. 141; and see cases cited in Scott, *op. cit.* 72.

[30] Ames, *Cases on Trusts* 11, Scott, *op. cit.* 67; see *People* v. *Merchants etc. Bk.* (1879) 78 N. Y. 269; *Briggs* v. *Central Nat. Bk.* (1882) 89 N. Y. 182; *People* v. *City Bank of Rochester* (1883) 93 N. Y. 582; *Baldwin's Bk.* v. *Smith* (1915) 215 N. Y. 76, 109 N. E. 138.

[31] See *supra,* footnote 9.

has already been pointed out the depositor does not contemplate physical transmission of the money deposited by him. He must contemplate that the payment will be effected in the customary manner and that the money deposited, upon being credited to the customer will be used by the banker as his own as a part of the common mass of money received from his depositors. The necessary legal conclusion from such an intention, acted upon, is that the banker's obligation is purely contractual, unless it is expressly stipulated that the money is to be set apart as a quasi-trust fund and held as such for the account of the dopsitor or the payee. This is the result actually reached by the English courts. When money is deposited with a banker for transmission in the usual course of business the obligation of the banker is contractual only.[32] If the banker fails before payment is effected, the depositor has the right of a general creditor and cannot claim any priority over general creditors.[33] And since a third person may not sue upon a contract made for his benefit the person to whom the payment is to be made acquires no rights against the banker by the deposit of the money with the latter.[34] But the banker has power to discharge his obligation by payment to the designated person. And upon failure to discharge it the banker's liability to the customer is in special assumpsit.[35] His undertaking is to exercise due care and promptness in the transmission of the funds by the customary exchange operation.[36] Under this rule there has been relatively a small amount of litigation in the English courts, with reference to deposits made with bankers for a specific purpose.

In many of the United States, on the other hand, the courts, disregarding the customary method of transmitting funds by bankers have applied the usual presumption, when moneys are deposited with a private individual for payment over to a third person and held the depositary liable as a fiduciary.[37] From the application of this rule it follows

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[32] *In re Barned's Banking Co.* (1870) 39 L. J. Ch. 635; *Williams* v. *Everett* (1811) 14 East 582, *(semble)*; *Grant* v. *Austin* (1816) 3 Price 58; *Yates* v. *Bell* (1820) 3 B. & Ald. 643, *(semble)*; *Wedlake* v. *Hurley* (1830) 1 Cr. & Jer. 83; *Hill* v. *Smith* (1844) 12 M. & W. 617; *Leete* v. *Disconto Gesellschaft* [1915] L. J. K. B. 281.

[33] *In re Barned's Banking Co.* (1870) 39 L. J. Ch. 635; see cases cited *supra*, footnote 32.

[34] *Ex parte Heywood (In re Holmes)* (1815) 2 Rose 355; *Williams* v. *Everett* (1811) 14 East 582; *Grant* v. *Austen* (1816) 3 Price 58; *Stewart* v. *Fry* (1817) 7 Taunt. 339; *Yates* v. *Bell* (1820) 3 B. & Ald. 643; *Henderson* v. *Rothschild* (1886) L. R. 33 Ch. D. 459; *Moore* v. *Bushell* (1857) 27 L. J. Ex. 3.

[35] *Hill* v. *Smith* (1844) 12 M. & W. 617; *Leete* v. *Disconto Gesellschaft* [1915] L. J. K. B. 281.

[36] *Leete* v. *Disconto Gesellschaft* [1915] L. J. K. B. 281.

[37] *Matter of LeBlanc* (1878) 14 Hun 8, affd. 75 N. Y. 598; *City of Miami* v. *Shutts* (1910) 59 Fla. 462, 51 So. 929; *People* v. *City Bk.* (1884) 96 N. Y. 32; *Cutler* v. *American Exch. Bk.* (1889) 113 N. Y. 593, 21 N. E. 593; *Strauss* v. *Tradesmen's Nat. Bk.* (1890) 122 N. Y. 379, 25 N. E. 372; *Stein* v. *Kemp* (1916) 132 Minn. 44, 155 N. W. 1052; *McBride* v. *American Ry. & L. Co.* (1910) 60 Tex. Civ. App. 226, 127 S. W. 229; *Wagner* v. *Bank* (1909) 122 Tenn. 164, 122 S. W. 245; *Banco Minero* v. *Ross* (Tex. Civ. App. 1911) 138 S. W. 224, *(semble)*; *Carlson* v. *Kies* (1913) 75 Wash. 171, 134 Pac. 808; *Covey* v. *Cannon* (1912) 104 Ark. 550, 149 S. W. 514; *Calhoun* v. *Sharkey* (1915) 120 Ark. 616, 180 S. W. 216; *Ryan* v. *Phillips*

that the person entitled to the credit is a preferred creditor who may claim priority of payment over general creditors.[38] And in a number of instances a banker, where an individual, on failing to effect the payment to the payee has been held guilty of embezzlement[39] or of larceny under those modern statutes which are broad enough to embrace embezzlement.[40] He is also subject to civil arrest where that process, as in New York, is applicable in the case of a breach of the fiduciary obligation.[41] There can, of course, be no question but that a fiduciary of moneys who appropriates those moneys to his own use is guilty of embezzlement. But to hold that a banker receiving money before his known insolvency, for transmission in the ordinary course of the banking business is guilty of larceny merely because of his failure to perform his undertaking or because he has placed the moneys thus received with his general funds and used them as such, would seem to be tantamount to holding that a banker who fails to pay his general depositors or who uses general deposits in his banking business is guilty of larceny. Criminal liability necessarily follows if the deposit is received in a fiduciary capacity. But there is no basis for the inference that it is so received if there is no stipulation that the moneys are to be held any differently than other funds deposited with the banker and upon his credit.

In *People ex rel. Zotti* v. *Flynn*[42] moneys deposited with a banker as the court stated, to be "forwarded," or as the banker's receipt stated, to be "sent" to a foreign country payable in the money of the foreign country were held to be a special deposit and the court upheld a conviction of larceny for the misappropriation of it, on proof that the banker had not effected the foreign payment in accordance with his undertaking. It was obvious in this case that the only way in which the payment could be effected was by the usual operations of exchange, since the dollars received by the banker in New York would not produce kronen in Austria, the place of payment, without the establishment of a credit in kronen, and it was equally obvious that the deposit of dollars, even if physically transported to Austria could not be used there for the establishment of such a credit. It is difficult, therefore, to interpret the undertaking of the banker in that case as being anything more than a contractual obligation to procure a foreign credit for the depositor by the usual methods of exchange.

(1896) 3 Kan. App. 704, 44 Pac. 909; *Shopert* v. *Ind. Nat. Bk.* (1908) 41 Ind. App. 474, 83 N. E. 515; *American Exch. Bk* v. *Loretta etc. Co.* (1897) 165 Ill. 103, 46 N. E. 202; *Montagu* v. *Pacific Bk.* (C C. 1897) 81 Fed. 602; *Titlow* v. *Sundquist* (C. C. A. 1916) 234 Fed. 613; *Massey* v. *Fisher* (C. C. 1894) 62 Fed. 958; *Anderson* v. *Pacific Bk.* (1896) 112 Cal. 598, 44 Pac. 1063; *Woodhouse* v. *Crandall* (1902) 197 Ill. 104, 64 N. E. 292; *Peak* v. *Ellicott* (1883) 30 Kan. 156, 1 Pac. 499.

[38] See cases cited *supra,* footnote 37. [39] See *State* v. *Grills* (1912) 35 R. I. 70, 85 Atl. 281; but *cf. Commonwealth* v. *Stone* (1912) 48 Pa. Sup. Ct. 210.

[40] *People ex rel. Zotti* v. *Flynn* (1909) 135 App. Div. 276, 120 N. Y. Supp. 511.

[41] *Johnson* v. *Whitman* (1871) 10 Abb. Pr. N. S. 111.

[42] (1909) 135 App. Div. 276, 120 N. Y. Supp. 511.

The courts in New Jersey have recently recognized that such a transaction, where the banker on receipt of United States currency undertook to "remit" to a foreign country, payment to be made in foreign money, was not an undertaking to transport physically the American money or to deliver foreign money but was a contractual obligation to secure credit for its depositor in a foreign country.[43] Nor is a deposit like that in *People ex rel. Zotti* v. *Flynn* a fiduciary or trust deposit because it was contemplated that the banker would keep the money as an identifiable *res*, held subject to a fiduciary or quasi-trust obligation until the foreign credit was established, both because such an undertaking on the banker's part was not stipulated for, and because it is contrary to established banking practice. This is the effect of the recent decision in the New York Court of Appeals in *Legniti* v. *Mechanics etc. Bank*[44] to which further reference will be made.

The doctrine that money deposited with a bank for a special purpose is a fiduciary deposit, has been carried to extreme lengths in this country in those cases where no specific money was ever paid to the bank, the customer merely giving or procuring a credit in account in favor of the bank upon the banker's undertaking to effect payment at a distant point. Here there is no specific deposit. The transaction results only in a credit appearing on the books of the bank, there being at no point of time any specific money or other *res* paid to or set apart or held by the bank for account of the customer. Even if there were an executory undertaking of the bank to become a fiduciary by setting apart such specific sum, such a relationship is not established until there is some actual setting apart or segregation of the money or some other *res* as the subject matter of the fiduciary relationship.[45]

Nevertheless in *Montagu* v. *Pacific Bank*[46] it was held that under such circumstances the customer was entitled to make claim against the receiver of the bank in priority to general creditors, thus holding in effect that the beneficiary of a trust contracted to be established could claim in priority to creditors although there had never been any trust *res* set apart for the customer.

In *State* v. *Grills*,[47] it was held that the banker by failing to effect the transfer was guilty of embezzlement of a "special deposit," which in fact had never existed in any form except that of a credit on the books of the banker. That the bank could not become fiduciary or

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[43] *Katcher* v. *American Exp. Co.* (N. J. Law 1920) 109 Atl. 741.

[44] (1921) 230 N. Y. 415.

[45] *Bayor* v. *American Trust etc. Bk.* (1895) 157 Ill. 62, 41 N. E. 622; *People* v. *Merchants etc. Bk.* (1879) 78 N. Y. 269; *In re Mutual Fund etc. Bk.* (D. C. 1876) Fed. Cas. No. 9976; see *Commonwealth* v. *Stone* (1912) 48 Pa. Sup. Ct. 210.

[46] (C. C. 1897) 81 Fed. 602; see also *Titlow* v. *Sundquist* (C. C. A. 1916) 234 Fed. 613; *Cutler* v. *American Ex. Nat. Bk.* (1889) 113 N. Y. 593, 21 N. E. 710; *cf. Moreland* v. *Brown* (C. C. A. 1898) 86 Fed. 257.

[47] (1912) 35 R. I. 70, 85 Atl. 281; see *Commonwealth* v. *Stone* (1912) 48 Pa. Sup. Ct. 210.

trustee of its own obligation to the customer or commit larceny of it would seem not to be an arguable proposition. [48]

A few courts have reached the conclusion that deposits of funds with a banker for transmission, in the absence of an express stipulation, create only contractual obligations, [49] but if the money is deposited "in trust" or "to the use" of another or under such circumstances as to indicate clearly that the moneys deposited are to be kept apart from the general funds of the bank and held for account of the depositor, effect is given to the expressed intention. [50] But even in those states committed to the doctrine that a deposit for a special purpose is a fiduciary or quasi-trust deposit, there has been of late, in cases relating to foreign exchange, a tendency to recognize the rule that a deposit of money with a banker for transmission creates a contractual rather than a fiduciary obligation, as conforming most accurately to established banking practice and consequently to the objectively established intention of the parties.

In *Strohmeyer* v. *Guaranty Trust Company* [51] which was an action brought upon contract for failure to transmit funds by foreign exchange, the court, in ordering a new trial, laid down the rule that the liability assumed was contractual. The court said:

"Technically speaking, there is a marked distinction between issuing a draft, or traveler's check, or transferring money by cable and receiving money for actual transmission. (*Musco* v. *United Surety Company,* 132 App. Div. 300). The very term 'cable transfer' precludes the idea that an actual transmission of money is contemplated. What the seller

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[48] See cases cited *supra,* footnote 45.

[49] *In re Hosie* (1872) 7 N. B. R. 601; *Bank of Blackwell* v. *Dean* (1900) 9 Okla. 626, 60 Pac. 226; *Butcher* v. *Butler* (1908) 134 Mo. App. 61, 114 S. W. 564; *Missouri etc. Ry. Co.* v. *Continental Nat. Bk.* (1908) 212 Mo. 505, 111 S. W. 574; see *Moore* v. *Meyer* (1876) 57 Ala. 20; *Schofield Mfg. Co.* v. *Cochran* (1904) 119 Ga. 901, 47 S. E. 208; *Fort* v. *First Nat. Bk.* (1909) 82 S. C. 427, 64 S. E. 405; Cabrera v. *Thannhauser & Co.* (Cal. 1920) 192 Pac. 45. In *Butcher* v. *Butler, supra,* the court said at page 67:

"There is nothing in the evidence to show that the particular $2000 placed to the trust fund account was to be kept separate and apart from the other funds in the bank. It was not segregated but was treated by the officers of the bank as was the money received by depositors." And at page 68: "The trade of a banker is to receive money and use it for profit. He is guilty of no breach of trust or impropriety in thus employing the funds coming into his custody from general depositors and his relation to them in no sense is to be treated as that of trustee and cestui que trust, but is that of debtor and creditor." And at page 69: "In the absence of proof to the contrary a deposit is presumed to be general and it devolves on the party who claims it is not to show that it was received by the bank with the agreement expressed or clearly implied that it should be kept separate from other funds of the bank and the identical money returned to the depositor."

"It is the custom of banks upon receiving money for a specific purpose, as to pay a note, to mingle the funds with their own, and to pay the note at the proper time, just as they would a check; the funds are not kept separate. There is no practical difference between such a deposit and a general deposit, and it seems clear that the bank should be held to the same liability as for a general deposit." Morse, *op. cit.* § 210.

[50] *supra,* footnote 9.

[51] (1916) 172 App. Div. 16, 157 N. Y. Supp. 955; see *Atlantic Communication Co.* v. *Zimmerman* (1918) 182 App. Div. 862, 170 N. Y. Supp. 275; *Oshinsky* v. *Taylor* (1918) 172 N. Y. Supp. 231; *Equitable Trust Co.* v. *Keene* (1920) 111 Misc. 544, 183 N. Y. Supp. 699.

of a cable transfer does is to sell a sum of money, or a credit for a sum of money, payable at the place indicated in the contract. What the buyer does is to purchase a credit available at such place . . . ."

And in *Legniti* v. *Mechanics etc. Bank*,[52] the plaintiff paid to Bolognesi & Company, private bankers, a sum of money upon their undertaking to transfer by cable the equivalent in lire to the plaintiff's credit with his bank in Italy. Bolognesi & Company deposited this money in their general bank account with the defendant and immediately thereafter failed and were adjudicated bankrupts. The plaintiff sought to impress a trust on the Bolognesi bank account with the defendant, on the theory that the deposit made with Bolognesi was special and was received by them in a fiduciary or quasi-trust capacity and that the deposit could be traced as a trust fund into Bolognesi & Company's bank account with defendant. The court held for the defendant on the ground that the deposit was general and that the obligation created was purely contractual involving no fiduciary or trust relationship. The court rested its conclusion on its interpretation of the course of business as one involving the "purchase" of foreign exchange which was a mere credit obligation the contractual right to which was acquired by the plaintiff on depositing his money with the banker.

In *Katcher* v. *American Express Company*[53] the New Jersey court of last resort held on similar reasoning that the obligation of the banker was contractual; that the proper action where the banker had not carried out his undertaking was in special assumpsit, and not money had and received, the duty of the banker being to use due care and despatch to procure the exchange in the customary manner.

Although the reason for holding the banker's obligation to be contractual in the case of foreign exchange transactions is perhaps more obvious than in the case of transmission of funds from a debtor to a creditor where no foreign exchange element is involved, the two transactions do not differ in any essential element, where the actual transaction of the identical money deposited is not contemplated. In either case the transmission of funds may be made effective by the banker, by the extension of his own credit in favor of the payee or by his acquisition of a credit with another bank in favor of the payee, the banker receiving in exchange the money deposited for the undertaking which he mingles with his general funds and uses as his own.

In the *Legniti* case the precise question was whether the money received by the banker for the "purchase" of foreign exchange and *before* any "exchange" or credit had in fact been procured by the banker for the depositor was a quasi-trust fund, or whether the banker was subject to a mere contractual obligation? The court decided that the latter was the case. It is a violent assumption that, of two cases of transmission of

[52] (1921) 230 N. Y. 415.

[53] (N. J. Law 1920) 109 Atl. 741.

funds otherwise identical in their facts, the banker, in the one in which money is to be paid in Paris, is a mere contractor whereas in the one in which the payment is to be made in the same or a nearby city he becomes a fiduciary of the funds received and remains such until the payment is effected. Nor should the particular form of the instructions to the banker be material if it is clear that what is intended is not a physical transmission of the money deposited but that the banker is free to effect a payment either from the general funds or by establishing a credit in favor of the payee.

In the *Legniti* case the court said:

"There is a marked distinction between these transactions which I have just described and a direction to a bank or other person to transmit a certain specific sum of money to a person abroad. In such cases the bank or transmitter is the agent of the person paying the money, and until the money is sent holds it as agent or trustee for the owner. Such were the cases of *Musco* v. *United Surety Company* (132 App. Div., 300) and *People ex rel. Zotti* v. *Flynn* (135 App. Div., 276). In these latter transactions the intention of the payer is that the money he gives to his agent shall be sent abroad. It is the amount which he gives that is to be transmitted. How it is sent may be immaterial to him. If there be time, currency might be purchased and sent. If not, it may be transmitted in any form recognized in financial circles. It is not at all necessary that the sender or agent have credit in the place to which the money is to be sent. On the other hand, in the contract for credit it is not a specific sum which is to be sent but rather a specific credit which is to be purchased. . . ."

It is believed that the *method* of transmission which is in fact consented to by the depositor is vital in determining the duty of the banker. If the banker may discharge his obligation by transmitting the fund "in any form recognized in financial circles" it is obvious that his obligation was precisely that of the banker in the *Legniti* case since he is free to discharge it by establishing a foreign credit. It is difficult to see, therefore, how the instructions to "send" or to "remit" or to "pay" funds to a third person impose any greater duty with reference to the money received by a banker than in the case where his undertaking is expressly to procure exchange, if it be admitted that in either case the banker's obligation may be discharged by his procuring the necessary exchange or credit. The banker may of course by his contract vary his liability by guaranteeing the payment instead of undertaking merely to use due care and despatch in procuring exchange but the liability is still contractual, not fiduciary. Nor is the nature of the banker's liability determined by referring to him as the "agent" of the depositor. An agent may assume either a contractual or a fiduciary liability with respect to money paid to him by the principal. The question is which kind of a duty did he assume, a question which can be answered only by inquiring as to the intention of the parties as evidenced by their acts interpreted in the light of the customary method of transacting business.

The great volume of litigation which has sprung from this simple banking transaction in the United States as contrasted with the English experience can only be attributable to the disposition of the courts in this country to impose on an important class of business transactions, a rule of law which does not conform to established business practice, and is not adapted to the economic needs of the business community.

The recent decision of the courts of New York and New Jersey in the case of foreign exchange holding that the obligation of the banker is contractual only, evidence a more just appreciation and exact appraisal of the importance of the method of conducting the banking business in determining what the undertaking of the banker is. The principle of decision in those cases ought to be extended and applied generally to those cases where bankers undertake to effect payments of money for account of their customers in the ordinary course of the banking business whether the exchange element is present or not.

The extension of the rule in the *Legniti* case generally to all cases of deposits of funds with a banker for transmission where there is no stipulation that the banker shall keep the deposit segregated as a trust fund, would not in any way limit the application of the rule that, when property other than current funds is received by the banker for account of his customer, it is to be treated legally as a quasi-trust fund. We have already seen that paper entrusted to a banker for collection is so held by him,[54] although he is treated as only a debtor for the proceeds when collected.[55] Bankers do not customarily use such property in their general business as bankers hence there is no custom or practice to rebut the common law presumption that such property is received in a fiduciary capacity.

The same rule may be applied without practical inconvenience when funds are to be transmitted through bankers. Treating the banker as owner of the funds deposited for transmission and his obligation as contractual, when he has once acquired a credit for transmitting the funds, any right which the banker thus acquires against his correspondent specifically for the purpose of effecting the transfer may be treated as a quasi-trust fund held for the benefit of his customer. In the *Legniti* case the banker failed before he had taken any steps to procure the credit pursuant to his contractual obligation. Had he actually acquired the credit and specifically appropriated it or a part of it to his undertaking for account of the plaintiff, a very different situation would have arisen and one on which the plaintiff might properly have based a claim that the credit so far as it was an enforceable one was held by the banker in a fiduciary capacity for the plaintiff. This was the holding in *Farley* v. *Turner*,[56] where the banker had established a credit with his correspondent and instructed his correspondent to pay the third person. Thereafter the bank

[54] *Supra*, footnote 28.
[55] *Supra*, footnote 30.
[56] (1857) 26 L. J. Ch. 710.

stopped payment. The credit was cancelled and the proceeds of the credit were received by one of the bankers who was liquidating the business. It was held that the money thus received was a quasi-trust fund,[57] although the English courts hold that the money when deposited with the banker for transmission, does not constitute such a fund, the bank being a general debtor. In a few cases a similar result has been reached on similar reasoning.[58] And in others involving a similar transaction this result has been properly reached, although the court placed its decision on the ground that the money when deposited constituted a quasi-trust fund.[59]

In this connection it is to be noted that not infrequently judicial decisions have been rested avowedly upon the doctrine that money deposited with a banker for transmission constituted a special deposit although such decisions might be upheld on other and more satisfactory grounds.

Thus money procured to be paid to the banker for transmission, by his fraudulent concealment, was held to be a special deposit entitling the depositor to priority to general creditors,[60] although the fraudulent concealment would in itself be a sufficient ground for imposing a trust on the funds in the hands of the banker when received.

In *Cutler* v. *American Ex. Bank,*[61] the plaintiff, a depositor, requested the defendant, his banker, to remit $500 to H in Leadville, Colo. The defendant credited its correspondent in Leadville and charged the plaintiff's account with the $500 and instructed the Leadville bank to pay H. The correspondent failed before payment to H. The plaintiff was allowed to recover from the defendant banker on the theory that a special deposit was involved in the transaction. Although obviously the only trust *res* was the claim of the defendant against the insolvent Leadville bank, the plaintiff was nevertheless allowed to recover his claim in full. The same result would have been reached had the deposit been deemed general, and had the defendant been deemed the guarantor of the solvency of the sub-agent, which is the settled rule in New York in the case of banking agents to collect.

Upon equitable principles a fiduciary cannot assert a counter-claim against his principal as an offset to the duty which the fiduciary owes

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[57] That a bank receiving money for account of its customers after its known insolvency is a fiduciary of the money is the general rule; see Scott, *op. cit.* 68n. *Farley* v. *Turner* was distinguished from the case of deposits of funds to be transmitted before any credit is established; *cf.* Lord Romilly, M. R., in *In re Barned's Banking Co.* (1870) 39 L. J. Ch. 635.

[58] See *St. Louis* v. *Johnson* (C. C. 1879) 5 Dill. 241; *Levi* v. *National Bk. etc.* (C. C. 1878) 5 Dill. 104; *Moreland* v. *Brown* (C. C. A. 1898) 86 Fed. 257.

[59] *Moreland* v. *Brown* (C. C. A. 1898) 86 Fed. 257; *Cutler* v. *American Exch. Bk.* (1889) 113 N. Y. 593, 21 N. E. 710.

[60] *People* v. *City Bk.* (1884) 96 N. Y. 32.

[61] (1889) 113 N. Y. 593, 21 N. E. 710; see *supra,* footnote 29; *Libby* v. *Hopkins* (1881) 104 U. S. 303, a case where a debtor owing a secured and an unsecured debt was held to have the right to apply a payment on the secured claim on the ground that the deposit with the creditor banker was for that purpose. The same result would have been reached by the application of the rule that the debtor may apply his payments to any one of several debts owed to the same creditor.

his principal.[62] Frequently the courts have invoked the special deposit doctrine in order to avoid the assertion of the banker's lien by the banker against the person entitled to the deposit.[63] The English courts, however, which treat the deposit for transmission as a general deposit and the banker's obligation as contractual, have found no difficulty in denying the banker's lien on principles of contract.[64]

Not only should the depositor be entitled to damages for breach of the banker's contract but the banker's undertaking should be deemed a waiver of his lien or right of counter-claim, which the court may make effective by allowing the full recovery by the depositor. In several cases the courts have taken that view.[65]

Where money is deposited for transmission, does the payee acquire any rights before actual payment to him? As we have already seen, through the device of bailment, fiduciary relationship or trust, the right to sue may be vested in the third person to whom funds are to be transmitted, as soon as the money is deposited with the banker if that is the actual intention of the parties. Where, however the banker is acting for the depositor, the inference is, where the deposit is deemed to be special, that the bank is a fiduciary for the depositor and not the payee, and that the depositor may reclaim the deposit at any time before payment to the principal.[66]

When the obligation of the banker is deemed contractual, rights are conferred on the payee only in those jurisdictions where a third party

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[62] *Morris* v. *Windsor Trust Co.* (1914) 213 N. Y. 27, 106 N. E. 753; *Britton* v. *Ferrin* (1902) 171 N. Y. 235, 63 N. E. 954.

[63] *Goldstein* v. *Union Nat. Bk.* (1919) 109 Tex. 555, 216 S. W. 409; *Continental Trust Co.* v. *Chicago Title Co.* (C. C. A. 1912) 199 Fed. 704, reversed on other grounds (1913) 229 U. S. 435, 33 Sup. Ct. 829; *Wagner* v. *Citizens' Bk. etc. Co.* (1909) 122 Tenn. 164, 122 S. W. 245; *Straus* v. *Tradesmen's Nat. Bk.* (1890) 122 N. Y. 379, 25 N. E. 372; *cf. Western Tie etc. Co.* v. *Brown* (1905) 196 U. S. 502, 25 Sup. Ct. 339; *Libby* v. *Hopkins* (1881) 104 U. S. 303; but see *Drovers' Nat. Bk.* v. *O'Hare* (1887) 119 Ill. 646, 10 N. E. 360; *Union etc. Bk.* v. *Dumond* (1894) 150 Ill. 501, 515, 37 N. E. 863, where the court thought the fiduciary obligation was to the payee.

[64] *Hill* v. *Smith* (1844) 12 M. & W. *618; *Bradford Old Bk.* v. *Sutcliffe* [1918] 2 K. B. 833.

[65] *Brockmeyer* v. *Washington Nat. Bk.* (1889) 40 Kan. 744, 21 Pac. 300; *Simonton* v. *First Nat. Bk. etc.* (1877) 24 Minn. 216; *Sandmeyer* v. *DeK. etc. Ins. Co.* (1891) 2 S. Dak. 346, 50 N. W. 353; *Furber* v. *Dane* (1909) 203 Mass. 108, 89 N. E. 227; *National Bk. etc.* v. *Speight* (1872) 47 N. Y. 668; *Dolph* v. *Cross* (1911) 153 Iowa 289, 133 N. W. 669; *Continental Trust Co.* v. *Chicago Title Co.* (C. C. A. 1912) 199 Fed. 704; *Smith* v. *Sanborn State Bk.* (1910) 147 Iowa 640, 126 N. W. 779.

[66] *Stein* v. *Kemp* (1916) 132 Minn. 44, 155 N. W. 1052; *City of Miami* v. *Shutts* (1910) 59 Fla. 462, 51 So. 929; *McLeod* v. *Evans* (1886) 66 Wis. 401, 28 N. W. 214; *Peak* v. *Ellicott* (1881) 30 Kan. 156, 1 Pac. 499; *Levi* v. *National Bk. etc.* (C. C. 1878) 5 Dill. 104; *Titlow* v. *Sundquist* (C. C. A. 1916) 234 Fed. 613; *City of St. Louis* v. *Johnson* (C. C. 1879) 5 Dill. 241; *People* v. *Bank of Rochester* (1884) 96 N. Y. 32; *Carlson* v. *Kies* (1913) 75 Wash. 171, 134 Pac. 808; *Covey* v. *Cannon* (1912) 104 Ark. 550, 149 S. W. 514; *Ryan* v. *Phillips* (1896) 3 Kan. App. 704, 44 Pac. 909; *Shopert* v. *Indiana Nat. Bk.* (1908) 41 Ind. App. 474, 83 N. E. 515; *McBride* v. *American Ry. etc. Co.* (1910) 60 Tex. Civ. App. 226, 127 S. W. 229; *Massey* v. *Fisher* (C. C. 1894) 62 Fed. 958; *McDonald* v. *American Nat. Bk.* (1901) 25 Mont. 456, 65 Pac. 896.

may sue on a contract made for his benefit,[67] or where the depositor, banker and the payee mutually agree that the banker shall be obligated exclusively to the payee, thus effecting a novation.[68] The English courts hold consistently that when there is no novation the payee acquires no rights before payment,[69] and this seems to be the effect of numerous American decisions.[70]

It thus appears that the rights which have been so strenuously asserted against bankers in American courts and which it has been thought could be preserved only by resort to the special deposit theory, may be fully protected by the English doctrine that the undertaking of the banker is contractual only, except in two respects. The person entitled to the deposit in the event of the failure of the bank cannot under that doctrine claim a priority over other creditors, and the banker is not under that doctrine held to the liability of a trustee or a fiduciary. The very essence of the right of priority over other creditors depends upon the setting apart of a particular fund for the benefit of the depositor.[71] There is no basis for giving one depositor a priority over another unless this is an essential part of the transaction. It is of course important that bankers should be held to a high standard of accountability to their customers. It would seem, however, that this should be accomplished by appropriate legislation which should inure to the benefit of depositors generally rather than by the adoption of a rule of law creating special rights in favor of a limited class of customers on the theory that they are the beneficiaries of a quasi-trust fund which never in fact exists or is intended to exist as such.

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[67] *Dolph* v. *Cross* (1911) 153 Iowa 289, 133 N. W. 669.

[68] *McEneaney* v. *Shevlin* [1912] 1 Ch. Ir. Rep. 32, affd, 278; *Heath* v. *New Bedford etc. Co.* (1904) 184 Mass. 481, 69 N. E. 215; *Andrews & Gayes* v. *State Bk. etc.* (1900) 9 N. Dak. 325, 83 Pac. 235; *Stradley* v. *Union Trust Co.* (Cal. 1919) 181 Pac. 823; *Elk etc. District* v. *Bennett Bk. etc.* (Iowa 1918) 168 N. W. 292; *Stephens* v. *Chehalis Bk.* (1914) 80 Wash. 254, 141 Pac. 340; *Meador* v. *Rudolph* (Tex. 1920) 218 S. W. 520, (*semble*).

[69] *Yates* v. *Bell* (1820) 3 B. & Ald. 643; *Moore* v. *Bushell* (1857) 2 L. J. Ex. 3; *Henderson* v. *Rothschild* (1886) L. R. 33 Ch. D. 459; see *Baron* v. *Husband* (1833) 4 B. & Ald. 611; *Williams* v. *Everett* (1811) 14 East 582; *Cobb* v. *Becke* (1845) 14 L. J. Q. B. 108; *Ex parte Heywood (In re Holmes)* (1815) 2 Rose 355; *Grant* v. *Austen* (1816) 3 Price 56; *Stewart* v. *Fry* (1817) 7 Taunt. 339.

[70] *Aetna Nat. Bk.* v. *Fourth Nat. Bk.* (1871) 46 N. Y. 82, citing with approval the English authorities, *Yates* v. *Bell* and *Williams* v. *Everett, supra,* footnote 69; *Seaman* v. *Whitney* (N. Y. 1840) 24 Wend. 260. See *First Nat. Bk.* v. *Clark* (1892) 134 N. Y. 368, 32 N. E. 38; *Hill* v. *Arnold* (1902) 116 Ga. 45, 42 S. E. 475; *Noyes* v. *First Nat. Bk.* (1917) 180 App. Div. 162, 167 N. Y. Supp. 288; *First Nat. Bk. etc.* v. *Higbee & Co.* (1885) 109 Pa. St. 130; *Nicholson* v. *Crook* (1880) 56 Md. 55; *Briggs* v. *Block* (1853) 18 Mo. 281; *Baker* v. *Moody* (1840) 1 Ala. 315; *Mayer* v. *Chattahoochee Nat. Bk.* (1874) 51 Ga. 325; *Cox* v. *Reeves* (1887) 78 Ga. 543, 3 S. E. 620; *Butler* v. *Duprat* (1884) 51 N. Y. Super. Ct. 77; *Staten Island etc. Club* v. *Farmers etc. Trust Co.* (1899) 41 App. Div. 321, 58 N. Y. Supp. 460; *cf. In re LeBlanc* (1878) 14 Hun 8, affd. without opinion (1878) 175 N. Y. 598; *Rogers etc. Works* v. *Kelley* (1882) 88 N. Y. 234.

[71] See Professor Horack, *Insolvency and Specific Performance* (1918) 31 Harvard Law Rev. 702.